MONTANA
Management View

An electronic newsletter for the state government manager from the Labor Relations Bureau

STATE PERSONNEL DIVISION, DEPARTMENT OF ADMINISTRATION • ISSUE 4 • JANUARY 2002

Gov. Martz opens state employee pay negotiations for FY 2004-05

Governor Martz provided opening remarks December 6 to about 35 bargaining unit representatives in the state's first economic bargaining session with the Montana Public Employees Association (MPEA) and MEA-MFT. These negotiations, along with negotiations with other major state employee unions, have established state employee pay and benefits for the last four biennia.

Governor Martz thanked participating employee representatives for their service in state government and for their efforts on the bargaining team. She challenged the group to work toward a mutually beneficial pay and benefits settlement in what will likely be fiscally tough times for state government. She pointed out that Montana is currently one of four states not facing a deficit. Given the economic forecast and the accompanying decrease in revenues, however, the governor told the group that projected revenues for FY 2004-05 may not meet current expenditure levels.

State and union negotiators will continue to meet over the next several months to discuss bargaining interests and issues with less economic impact. A clearer revenue picture will be available next summer, in

Highlights

the first quarter of FY 2003. The state will not be in a position to advance an economic proposal until then.

MPEA and MEA-MFT announce statewide bargaining team

MPEA and MEA-MFT notified the Labor Relations Bureau in December of the bargaining team representatives selected to participate in statewide economic negotiations (see previous story). Following is a list of the representatives and alternates, where applicable:

Agency	Bargaining Unit	Representative	Alternate
Agriculture	Agency-wide	Bob LaRue	
Corrections	Pine Hills Custody	Tim Crews	
	Pine Hills Teachers	Bill Zook	Shirley Kapitzke
	Probation & Parole	Bob Passuccio	Monty Warrington
	Montana State Prison	Steve Hatcher	Kim Foster
	Montana Womens Prison	Patty White	
Environmental Quality	Environmental Quality	Alan Harbaugh	Ken Liston
Fish, Wildlife & Parks	Biologists	Gary Olson	Quentin Kujala
	Wardens	Chris Anderson	
Justice	Communications Center	Rose Fitzpatrick	
	Drivers Examination	Milo Colandonato	Eleanor Williams
	Highway Patrol	Joe Cohenour	Soctt Swingley
	Title & Registration	Sharon Scalise	Jan Ridley
Labor & Industry	Certain Employees	Clint Jatkowski	
Public Health	Central Office	Jill Cohenour	Karen Whyde
	Central Office	Clint Ohman	Allen Richards
	MCDC Counselors	JoLynn Tracy	John Jurcich
	MDC Professionals	Don Alsager	Julie Dahlin
	MMHNCC Direct Care	Frank Westhoff	
	MMHNCC LPNs	Vickie Olson	Gail Teserek
	MSH Care & Service	John McHugh	Carol Zitek
	Montana Veterans Home	Cathy Neff	Ed Puckett
	Public Assistance	Sue Carr	
	Social Workers	Scott Harris	
Public Instruction	Agency-wide	Michael Hall	
Revenue	Revenue	Joe Rask	Chuck Morgan
Transportation	Non-Maintenance	Tim Fellows	

Release time - The state agreed to provide a reasonable amount of release time for attendance at bargaining sessions to one person from each bargaining unit represented by one of the two unions. Bargaining sessions typically last two to three hours. In practice, members traveling from out of town have been

granted one day – or eight hours - of release time, while Helena members are granted release time for all actual hours spent in bargaining up to eight. Members must go through the normal chain of command to notify their supervisors of thier absence.

Meeting notification – The unions are responsible for notifying their members of meeting times and cancellations.

Member changes – The Labor Relations Bureau will notify agency personnel officers of any changes representation in their affected bargaining units.

The LMTI offers training for front-line managers and employees to improve labor relations

Managers who work with unions will have a special chance in March to gain new tools and valuable tips for better labor-management relations. Two days of fast-paced, interactive training at Chico Hot Springs are offered to managers and labor representatives by a statewide committee of personnel officers and union agents charged with administering the Labor Management Training Initiative (LMTI). State government's front-line managers and employee representatives will train side by side, explore a variety of communication and problem-solving strategies, and learn to adapt these tools for the most effective use in their particular labor-management environment.

Featured trainers include staff from the Federal Mediation and Conciliation Services (FMCS) and the Oregon Employment Relations Board. The first day will focus on effective labor-management committees – what they are, what they do, how they work, and how to build and maintain (or resurrect) an effective committee. On the second day, participants will learn and practice various problem-solving methods with simulated labor-relations issues.

✔ ***Pencil it in now:***

Labor Management Cooperation Training
March 26 and 27, 2002
Chico Hot Springs

Agency personnel officers will select managers from throughout their agencies to attend this event. Employee representatives will be selected by their respective labor organizations. Staff from MEA-MFT and Montana Public Employees Association (MPEA), the Montana

Board of Personnel Appeals, the Labor Relations Bureau, and state agency personnel officers will join the front-line managers and employee representatives.

Look for registration details and a complete agenda to be furnished to participating departments by the end of January. For more information, you can call your agency personnel officer or Stacy Cummings, Labor Relations Bureau, at 444-3892 or stcummings@state.mt.us.

Progressive discipline:

What's the shelf life of a written warning?

> ***destroy*** *– **1.** To ruin completely; spoil so that restoration is impossible; **2.** To tear down or break up; raze; demolish. **3.** To do away with; get rid of; put an end to. **4.** To kill. **5.** To render useless or ineffective.*
>
> *-- American Heritage Dictionary*

Managers have a lot to think about when administering progressive discipline. Selecting an appropriate corrective action to fit the severity or repetition of an employee's proven misconduct is no easy task. The union contract can be an important consideration. Many contracts determine or influence whether management has just cause to consider prior discipline in future progressive discipline.

Does your contract require written disciplinary warnings to be destroyed or removed from the personnel file after a certain length of time? If so, what does "destroyed" mean? Does "removed" mean a warning letter can be moved from the personnel file to another place to be used at a later time? Can the employee's past work record still be considered in future discipline even if the prior warning letters have been destroyed? These kinds of questions confront the manager who is administering progressive discipline.

Progressive discipline is the process of applying disciplinary actions, moving from less serious to more serious actions, based on the initial severity or on the repetition of the problem behavior (*www.discoveringmontana.com/doa/spd/mom/discipline%20guide.doc*). An employee who fails to heed an oral warning for a minor or first-time violation might get a written warning. An employee who does not comply with the written warning might be a candidate for suspension without pay. If the misconduct is not

corrected after a suspension, discharge might be the next appropriate step. And if any of these steps overlook or disregard certain contract language, an arbitrator might overturn the discipline entirely. The intent of this ***Management View*** article is to help keep that from happening.

How does a union contract affect management's ability to consider an employee's work record in progressive discipline? Management certainly has a right to correct employee misconduct and to consider the employee's past work record. These rights, however, can be modified or limited by certain contract language. The work record management relies upon in progressive discipline must be documented. Most union contracts limit the useful lifespan of disciplinary documentation. Even when contracts don't contain specific time limits, a labor arbitrator might overturn the discipline if it appears too reliant on outdated or irrelevant prior warnings and reprimands.

Here's a common contract provision:

> *"Letters of caution, consultation, warning, admonishment and reprimand shall be considered temporary contents of the personnel file of an employee and shall be destroyed no later than one year after they have been placed in the file unless such items can be used in support of possible disciplinary action arising from more recent employee action or behavior patterns or is applicable to pending legal or quasi-legal proceedings."*

A couple questions might arise from this contract language: (1) What does "destroyed" mean? (2) What does "more recent employee action or behavior patterns" mean? All contract language is subject to interpretation. If the language appears plain and unambiguous, there probably isn't much room for creative interpretation. *(See decisions by Arbitrator Jane Wilkinson and Arbitrator William Corbett in the Arbitration Roundup on page 6 of this issue of* ***Management View****.)*

What does "destroyed" mean?

This question might arise in a scenario something like the following. A written reprimand goes into an employee's personnel file. The contract limits the useful lifespan of the reprimand to one year, such as the above contract provision. A year passes with no recurrence of misconduct, therefore, no subsequent discipline. On the one-year "anniversary" of the letter going in the file, the employee either fails or forgets to ask management to destroy the letter. Management either fails or forgets to destroy the letter. The letter sits in the file. Only a month later, or about 13 months after the letter went in the file, the employee commits another infraction. The new infraction is similar to the prior

misconduct. The manager begins considering corrective action and notices the prior letter in the personnel file.

Is there much value to the 13-month-old letter in terms of progressive discipline? Was the employee obligated to request of management, or to notify management, that the letter needed to be destroyed at 12 months? Does the prior letter have life beyond 12 months because the employee demonstrated more recent misconduct similar to the previously documented behavior pattern? Should management consider the 13-month-old written warning to be a bona fide step in progressive discipline, thereby justifying a suspension without pay for the newest incident of misconduct? Many arbitrators would answer "no, no, no and no." In this kind of scenario, arbitrators have found that unless the recurrence of misconduct occurs within the one-year during which the contract gives life to the warning letter, the prior warning may not be used as a progressive discipline step in subsequent disciplinary action.

So what does "destroyed" mean? Like all contract language, it is subject to interpretation. But there probably isn't much wiggle room. Granted, our high school biology teachers implored us to remember that "matter can never be destroyed – it can only be displaced." And weren't our teachers reasonable people? Nice theory – wrong application. Labor arbitrators aren't inclined to be moved by theories of molecular biology in this type of dispute. They care more about theories of just cause. Many arbitrators would say "destroyed" means something akin to the definition at the beginning of this article – ruined, rendered useless, kaput. Despite the magic of nature's laws, an arbitrator isn't likely to believe a destroyed letter can be undestroyed and given new life for management's convenience in progressive discipline. What if the contract says the letter shall be "removed" rather than "destroyed?" Does that mean the letter can be moved from the personnel file and placed into another file for use after the negotiated expiration date? Most arbitrators would probably say "no." Managers are probably well-advised to view "removed" and "destroyed" as having the same meaning in the defined shelf life of a written reprimand.

What does "more recent employee action or behavior patterns" mean?

In the above contract language there is one (and only one) exception to the requirement that a disciplinary letter be destroyed after one year. The exception is when the letter *"can be used in support of possible disciplinary action arising from more recent employee action or behavior patterns or is applicable to pending legal or quasi-legal proceedings."* As noted earlier, many arbitrators have found that unless the recurrence of misconduct occurs *within the one-year during which the contract gives life to the warning letter*, the prior warning may not be used as a progressive discipline step in subsequent disciplinary action.

The employee who keeps his or her "nose clean" for a year (no documented misconduct or reprimands) could be deemed by an arbitrator to be "off the hook" to the extent the prior written warning may be used in future progressive discipline.

Sometimes a disciplinary incident can be relevant even after the documentation has been purged from the personnel file. It depends on how management views the discipline – and then how an arbitrator will view it. In certain situations, arbitrators will uphold disciplinary penalties based on management testimony about a history or pattern of misconduct, despite the fact the prior documentation was destroyed or removed from the personnel file. The rationale is that one of the classic "tests" of just cause is whether "the penalty fits the crime" in view of the employee's overall work record. An incident of misconduct might be more than a year old, but that doesn't mean it never happened. The documentation might no longer be in the personnel file, but that doesn't mean the incident never happened. In "non-progressive-discipline" situations where management is disciplining an employee for a single and recent incident of misconduct, management has a right to consider the employee's overall work record in deciding an appropriate penalty. Admittedly, the line can be very fine or gray between appropriately stiffening the penalty for prior proven infractions that are no longer referenced in the personnel file, versus violating the principles of progressive discipline because of outdated or stale infractions.

Important Note: ***"Old" warnings are sometimes relevant aside from "progressive discipline."***

Arbitration roundup

Each arbitration case involves specific bargaining histories, contract language and facts that could be unique to the agency involved. Contact your labor negotiator in the Labor Relations Bureau if you have questions about how similar circumstances might apply to language in your agency's collective bargaining agreement.

Disciplinary warnings: How old is "too old?" What's a behavior "pattern?" Two arbitrators share their views -

A Montana state agency discharged an employee who was repeatedly tardy and absent from work. The employee often failed to notify management adequately in advance if his absences. Management counseled him numerous times on the need to show up for work promptly and the need to provide notification of

absences well in advance. Despite the counseling, the problem continued, to the point the employee missed work a dozen times in a five-month period without providing adequate notice. The employer suspended him without pay for five days. The employee did not grieve the suspension. The suspension letter clearly warned the employee that any further incidents of this nature would result in employment termination.

The union contract said: *"Letters of caution, consultation, warning, admonishment and reprimand shall be considered temporary contents of the personnel file of an employee and shall be destroyed no later than 1 year after they have been placed in the file unless such items can be used in support of possible disciplinary action arising from more recent employee action or behavior patterns or is applicable to pending legal or quasi-legal proceedings."*

The employee served the one-week suspension. In the eight months that followed the suspension, there were six incidents in which the employee was either tardy or did not provide ideal notice to management of an absence. But none of these incidents were as severe as the incidents that had occurred prior to the suspension. The supervisor verbally counseled the employee on these six incidents, but there was no evidence that these counseling sessions rose to a level that would constitute "discipline."

The incident that triggered the employee's discharge occurred 20 months after his five-day suspension. He did not arrive for work one day. Management's efforts to contact the employee were unsuccessful. The employee was a no-show for two consecutive days without providing any notice to the employer. Management decided strong discipline was warranted. Management decided to discharge the employee in light of the fact that a prior suspension for the same infraction had not corrected his behavior sufficiently.

Arbitrator Jane Wilkinson returned the employee to work with back pay, minus five days of pay. She ruled that a five-day suspension was warranted because management had considered infractions that were more than one year old in arriving at the decision to discharge the employee. *"The collective bargaining agreement states that letters involving discipline shall be destroyed no later than one year after they have been placed in the file, unless such items can be used in support of possible disciplinary action arising from more recent employee action or behavior patterns,"* Wilkinson ruled. *"If more than a year lapses between infractions, then the contract bars consideration of the earlier infraction. The contract provision means that prior disciplinary records must be destroyed unless further discipline is imposed during the ensuing one-year period. If that happens, the one-year period begins anew."* In this case, the grievant went about 1 ½ years without any new formal discipline being imposed. *"The*

employer improperly based its decision to terminate the grievant on materials that were required by the contract to have been removed from the grievant's file," Wilkinson ruled. *"To sustain a termination based on improperly retained materials would be to nullify the purpose of the contract provision."*

> ***"The Employer improperly based its decision to terminate the grievant on materials that were required to have been removed from the grievant's file."***
>
> ***-- Arbitrator Wilkinson***

In a different case, a Montana state agency suspended an employee without pay for four days following an incident in which she damaged a piece of equipment. The nature of the work and the necessity for careful use of equipment called for contract language that said: *"Any preventable accident which occurs more than 18 months in the past shall not be considered in the determination of disciplinary action for future preventable accidents."* The grievant, in the 18 months that preceded the suspension for the damaged equipment, had been warned and counseled about a number of unrelated behavior problems. These included warnings for two separate instances of carrying an unauthorized passenger in a state vehicle, warnings for two separate instances of taking a day off without her supervisor's approval, and a warning for performing a certain work duty negligently.

> ***"An employer is not compelled to accept the unacceptable from an employee merely because the employee finds new ways to be unacceptable."***
>
> ***-- Arbitrator Corbett***

The union argued the various infractions were not similar enough to constitute a severe problem in any one area. The union argued a four-day suspension was too severe, and that progressive discipline requires something less than a suspension given this was the first incident of broken equipment. Arbitrator William Corbett upheld the suspension. The union argued an employer may not consider prior disciplinary situations that are factually unrelated to the current disciplinary problem. Corbett dismissed the argument. *"Progressive or corrective discipline is premised on the belief that employees should be given an opportunity to come into compliance with the legitimate expectations of their employer,"* Corbett ruled. *"The principle is that it is the responsibility of the employee, after appropriate notice, to meet those expectations. An employer is not compelled to accept the unacceptable from an employee merely because the employee finds new ways to be unacceptable."* ///

Questions, comments or suggestions? Contact the Labor Relations Bureau or visit our website: www.discoveringmontana.com/doa/spd/index.htm

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